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No. 95-738

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF THRIFT SUPERVISION,

Petitioner,

v.

ROBERT D. RAPAPORT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a decision which enforces statutory limitations on the agency's ability to order payment of money, but which affects neither the agency's ability to seek damages in an Article III court, nor its ability to seek money in an administrative forum when it can show unjust enrichment, compromises or improperly limits the enforcement powers of federal banking agencies.

2. Whether there is a split in the circuits, when the Fifth Circuit found the defendant had received a significant personal benefit, but no corresponding benefit was present in this D.C. Circuit case, and when the D.C. Circuit found that fact alone could be sufficient to reconcile the two cases.

3. Whether the D.C. Circuit's handling of the issue of *Chevron* deference was inappropriate or even dispositive, when OTS is not the only agency entitled to administer and interpret the statute, when OTS' proposed "interpretation" was at odds with statutory language and Congressional intent, and when the court would have reached the same result under *Chevron* principles or under *de novo* review.

4. Whether it is appropriate for this Court to grant certiorari to consider a theory of recovery never advanced by OTS in the agency proceeding or in the D.C. Circuit, and never proposed by any banking agency in any other case, particularly where the new theory is no more than a play on words, totally at odds with principles of statutory construction, the agency's own interpretation of the statute, and common sense.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Robert D. Rapaport, through his counsel, hereby opposes the Petition of the Solicitor General, filed on behalf of the Department of Treasury, Office of Thrift Supervision ("OTS"), for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

COUNTER-STATEMENT OF THE CASE

The Government's Statement of the Case is inaccurate in two

noteworthy respects. These inaccuracies are addressed *infra* at pp. 6-7, and p. 18, n. 10.

SUMMARY OF ARGUMENT

Until the filing of this Petition, the sole theory advanced by OTS to justify its recovery of money in an administrative (as distinguished from a judicial) proceeding was that Respondent failed to make a monetary payment under the terms of a net worth maintenance agreement and that such failure, by itself, constituted unjust enrichment within the meaning of 12 U.S.C. § 1818(b)(6)(A). The D.C. Circuit unanimously rejected the agency's theory and, in doing so, drew a distinct line between those circumstances in which a banking agency is authorized to seek a money recovery in administrative proceedings and those circumstances in which the agency must pursue its remedies in an Article III court. It correctly reasoned that § 1818(b)(6)(A) requires evidence of unjust enrichment — a personal benefit, something more than a failure to make a monetary payment under a contract — as a prerequisite to the recovery of money in an administrative proceeding.

In rejecting OTS' theory, the D.C. Circuit relied upon the fact that Respondent was only a shareholder of the institution, that he did nothing to cause its losses, that he received no personal benefit in any transaction with the institution, that he violated no law or regulation, and that the agency was free to pursue any alleged breach of contract remedy against Respondent in a judicial proceeding. In short, the D.C. Circuit viewed the agency's claim against Respondent as a straightforward contract dispute, not involving unjust enrichment, which should be decided by an Article III court and not on the agency's "home turf."

The Petition makes several imaginative but erroneous arguments in an effort to erase the statutory line between administrative and judicial disputes. It argues that the agency's interpretation of § 1818(b)(6) is reasonable and that the court should have deferred to the agency's reasonable interpretation of the term "unjustly enriched" as it is used in § 1818(b)(6)(A)(i). If the Government is correct, however, the term "unjustly enriched" as used in the statute will have no meaning whatsoever, since every dispute involving a failure to pay money would then be a candidate for an administrative resolution. This result flies in the face of the clear meaning of § 1818(b)(6), as well as the clear statements of Congressional intent. Equally important, there is not a single federal court ruling which would support the theory advanced by the agency.

Apparently recognizing the weakness of the agency's interpretation of § 1818(b)(6), the Government suggests a new theory to justify adjudicating monetary disputes in an administrative forum. It argues that OTS' § 1818(b)(1) "cease-and-desist" authority is sufficient to order affirmative relief so long as it phrases the order in a double negative. That is, instead of saying "I order you to pay money," which invokes the agency's affirmative action authority and implicates the statutory limits on that authority, the agency simply has to say "I order you to stop not paying money." Respondent submits that this new theory is simply a cynical play on words and, like the Government's "deference" theory, is just another way to erase the statutory line between cases appropriate for administrative proceedings and cases appropriate for judicial proceedings. Moreover, since this new theory has never been used before by OTS in this (or by any banking agency in any other) litigation, the final order issued by the OTS must stand or fall on the theory argued at the agency level and before the court of appeals. Counsel's *post hoc* rationalization for the agency's action must be rejected.

The Government also suggests that there is a split in the circuits, arguing that the Fifth Circuit has interpreted § 1818(b)(6) more broadly than did the D.C. Circuit below. However, the facts of the two cases are materially different. In the Fifth Circuit's decision, the respondent was in control of the institution and derived an immediate personal benefit from the agency's forbearance from pursuing a cease-and-desist action that threatened that control. In this case, the D.C. Circuit relied upon the fact that Respondent did not control the institution and did not receive any personal benefit. That factual difference, the court concluded, may be sufficient to reconcile the two cases.

Finally, the Government suggests that the D.C. Circuit's decision imposes "unjustified limits" on the ability of federal banking agencies to order the payment of money in administrative proceedings. If those limits are "unjustified," the banking agencies ought to seek relief in the halls of Congress where those "limits" were imposed in the first place. The D.C. Circuit did not create or invent the term "unjustly enriched." It merely held that the banking agency has not proven the factual prerequisite clearly specified in the statute and, therefore, the agency must seek relief, if at all, in a judicial, rather than administrative, forum.

REASONS FOR DENYING THE WRIT

I.

THE D.C. CIRCUIT'S DECISION DOES NOT SOUND THE DEATH KNELL FOR ENFORCEMENT OF NET WORTH MAINTENANCE AGREEMENTS.

The D.C. Circuit's decision does not spell the end of the banking agencies' ability to enforce net worth maintenance agreements *appropriately*. The decision does no more than

enforce the mandate of Congress that where, as here, a banking agency elects to enforce the agreement in an administrative action and seeks in that action to recover money for violation of the agreement, it must do so within the limitations Congress has placed on that particular remedy, by proving unjust enrichment or reckless disregard for law or regulation.

The decision does nothing to diminish the ability of a banking agency to sue for breach of contract in an Article III court if it believes the net worth maintenance agreement at issue is an enforceable contract.[1] *See In re Conner Corp.*, 127 B.R. 775 (E.D.N.C. 1991); *RTC v. Savers, Inc.*, 1990 U.S. Dist. LEXIS 10294 (E.D. Ark. June 12, 1990); *RTC v. Tetco, Inc.*, 758 F. Supp. 1159 (W.D. Tex. 1990), *vacated*, 1992 WL 437650 (5th Cir. 1992). Any civil suit for breach of contract naturally turns on its own facts. But even if the facts of this case are such that OTS would lose in a civil court, that does not give OTS the right to an administrative forum if it does not satisfy the statutory criteria. There is no federal policy that a banking agency must always win. *O'Melveny & Myers v. FDIC*, __ U.S. __, 129 L. Ed. 2d 67, 76 (1994).

The Government has lost sight of the fact that Congress never intended an administrative action to recover money to be the remedy of choice for the banking agencies. The Senate

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1. In its opinion, the D.C. Circuit stated that bank regulators could bring an action to enforce a net worth maintenance agreement in a U.S. District Court pursuant to 12 U.S.C. § 93. This is technically incorrect as applied to OTS but, assuming OTS is the proper successor to the agreement, OTS would have authority under the Home Owners' Loan Act, 12 U.S.C. § 1464(d)(1)(A), to sue for breach of contract in a district court. As an example, OTS' predecessor agency, the Federal Savings & Loan Insurance Corporation, filed a civil action for breach of contract on a net worth maintenance agreement, as a party to the agreement, citing its general "sue or be sued" authority, 12 U.S.C. § 1725 (1982). *FSLIC v. Mason*, Civil Action No. HM 88-3107 (U.S.D.C. Md.).

Committee Report which accompanied § 1818(b)(6) made this clear:

> It is the Committee's intent, however, that this power [to order affirmative relief] be used only in appropriate cases, for example, where the institution-related party has unjustly enriched himself at the institution's expense or . . . has acted in reckless disregard of the banking laws and regulations. It is not intended that this power will be used in cases where the institution-related party engaged in less serious violations.

S. Rep. No. 774, 101st Cong., 1st Sess. 39-40 (1989). OTS is entitled to an administrative forum, its "home court advantage," only when the statute permits. It is not entitled to convert every case seeking money damages for breach of contract into an administrative cease-and-desist proceeding.

Nor does the D.C. Circuit's decision compromise the ability of OTS to proceed in an administrative forum and collect money damages when it can prove unjust enrichment or reckless disregard for the law, as 12 U.S.C. § 1818(b)(6)(A) requires. The Government tries to give a false impression in its Petition that many cases will be compromised or lost if the D.C. Circuit's decision stands. Petition at p. 23. However, Respondent's counsel, who make an effort to stay abreast of net worth maintenance cases, are aware of only one other existing administrative net worth maintenance case.[2] In that case, which

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2. Respondent's counsel also know of one other net worth maintenance matter in which OTS recently gave the potential Respondent an "intent to sue" letter, saying that an administrative proceeding will be commenced during the month of December 1995. Obviously OTS is not deterred in that case by the D.C. Circuit's decision.

also seeks a monetary recovery, OTS has taken the position that it can go forward and prove its case in an administrative proceeding, despite the D.C. Circuit's decision.[3]

Indeed, as discussed *infra*, there is no reason to believe the D.C. Circuit's decision, had it then existed and been the applicable rule of law, would have prevented an OTS recovery in *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992), the only contested net worth maintenance case OTS has won. The Fifth Circuit found a direct personal benefit to Mr. Akin in return for his agreement to maintain the institution's net worth, a benefit which Judge Ginsburg noted in *Rapaport* may have satisfied the statutory requirement of unjust enrichment ("Had Rapaport received the benefits of office as Akin did, he may well have been 'unjustly enriched,' at least to that extent, and that distinction may be enough to reconcile the two cases." *Rapaport*, Petitioner's Appendix ("Pet. App.") at 17a.

II.

THERE IS NO SPLIT AMONG THE CIRCUITS REQUIRING RESOLUTION BY THIS COURT.

The Government asserts as a reason for review by this Court that the holding of *Rapaport* is in conflict with the Fifth Circuit's decision in *Akin*. However, there is no conflict between *Rapaport* and *Akin* that is ripe for review at this time or which requires this Court's resolution.

Both cases required the reviewing circuit court to decide whether money damages could be recovered in an administrative proceeding for violation of a net worth maintenance agreement.

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3. Indeed, in this other pending net worth maintenance case, OTS has taken the position in its motion papers that the Administrative Law Judge is free to ignore *Rapaport*.

Both circuit courts correctly concluded that this implicated the affirmative action requirements of 12 U.S.C. § 1818(b)(6) and specifically the limitation in §1818(b)(6)(A) that OTS must prove unjust enrichment or reckless disregard of the law in order to obtain a money recovery. In *Akin*, unlike *Rapaport*, the court held that unjust enrichment had been proved. OTS has always claimed *Akin* so held on the ground that failure to "pay up" under the net worth maintenance agreement, in and of itself, constituted unjust enrichment, but the Fifth Circuit never said that. The Fifth Circuit mentioned Akin's failure to pay. However, it also mentioned Akin's status as President, Chairman, CEO and sole shareholder of the institution and the fact that Akin entered into his net worth maintenance agreement specifically to avoid the institution of cease-and-desist proceedings that would have threatened his continued control of the institution. These factors of institutional control and personal benefit are totally absent in *Rapaport* and, as Judge Ginsburg said, ". . . that distinction may be enough to reconcile the two cases." *Rapaport*, Pet. App. at 17a.

Are there areas of possible conflict between *Rapaport* and *Akin*? The cases potentially conflict, as Judge Ginsburg noted, on the measure of damages. *Id.* Damages in *Akin* were measured by the loss to the institution, whereas the correct measure of damages in an unjust enrichment case, Judge Ginsburg noted, is the benefit conferred on the defendant. However the issue of how damages should be measured was not discussed in any detail in *Akin*, and there is no indication that the correct measure of damages was an issue raised on appeal in that case. If there is any potential question about the correct measure of damages, it is one that needs to be further developed and articulated in the lower courts before it is ripe for resolution by this Court.

III.

THOUGH THE ISSUE WAS NOT CRITICAL TO THE OUTCOME OF THE CASE, THE D.C. CIRCUIT PROPERLY DECLINED TO DEFER TO OTS' "INTERPRETATION" OF UNAMBIGUOUS LANGUAGE IN A STATUTE ADMINISTERED BY SEVERAL AGENCIES IN ADDITION TO OTS.

The Government claims that, under the rule of *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the D.C. Circuit should have deferred to OTS' position, characterized by the agency as an "interpretation" of statutory language, that the unjust enrichment requirement of § 1818(b)(6)(A)(i) is met whenever money is allegedly owed, but not paid, under a net worth maintenance agreement. The majority of the D.C. Circuit panel correctly rejected OTS' argument that it must defer to agency "interpretation" of unambiguous language in a statute which several agencies (not just OTS) administer. Judge Rogers did not join in this part of the panel's decision, though she concurred in the result. However, the "deference" issue, if it is an issue at all, provides no basis for review of the D.C. Circuit's decision by this Court. Not only was the majority correct in its view that *Chevron* deference was not owed to OTS' "interpretation," but it is clear from both the majority and concurring opinions that the issue of "deference" was not critical to the outcome of the case.

Chevron does not require that a court defer to an agency "interpretation" of statutory language that is clear and unambiguous:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are

> contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. at 843, n. 9 (citations omitted). *See also In re Seidman*, 37 F.3d 911, 924 (3d Cir. 1994) ("interpretations contrary to the plain meaning of the statute are unacceptable" and not entitled to deference); *and see Rapaport*, Pet. App. at 20a (clear language of the statute and legislative history directly contradicts the agency interpretation for which it demands deference) (Judge Rogers concurring).

The D.C. Circuit majority found § 1818(b)(6)(A)(i) clear on its face, and it found that the statutory language and legislative history contradicted OTS' proposed "interpretation" of the term "unjust enrichment." The starting point for interpretation of any statute is not the agency's interpretation, but rather is the language of the statute itself. *Transohio Savings Bank v. OTS*, 967 F.2d 598, 614 (D.C. Cir. 1992), quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). Absent clearly expressed legislative intention to the contrary, the language of the statute must be regarded as conclusive. *Id.* In this case, the D.C. Circuit simply analyzed the plain language of the statute and concluded, quite properly, that the term "unjustly enriched" in § 1818(b)(6)(A)(i) should have its ordinary meaning at common law. *Rapaport*, Pet. App. at 11a. The court also looked to the legislative history of the statute to ascertain the Congressional intent behind the provision. It concluded that OTS' proposed "interpretation" of § 1818(b)(6)(A) would "eviscerate the clear Congressional intent" which obviously required "something more than failing to uphold one's end of a contract when it required that a party have been 'unjustly enriched' before he can be held personally liable in an

administrative proceeding." *Id.* at 16a-17a.[4] Even if deference to OTS' interpretation of § 1818(b)(6)(A) was an issue, the Court held, ". . . our analysis in *Wachtel* of the history of the statute and of the related case law would lead us to the same conclusion." *Id.* at 14a. In *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993), the court found that even if deference were otherwise proper, it "... would not defer to OTS' interpretation since the statutory language is not ambiguous and the agency's construction is capricious." *Id.* at 585.

The D.C. Circuit also declined to grant *Chevron* deference to OTS' "interpretation," because OTS shares responsibility for administering the statutory provisions of which § 1818(b)(6)(A)(i) is a part with the other banking agencies. Under such circumstances, Judge Ginsburg wrote, deferring to the interpretation of a single agency "... would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all." *Rapaport*, Pet. App. at 10a. The D.C. Circuit's holding that deference to a single agency's interpretation of a statute or regulation is not required where multiple agencies administer the statute or regulation is perfectly correct. *See Wachtel*, 982 F.2d at 585 (D.C. Cir. 1993); *1185 Ave. of Americas Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir. 1994) (declining to give full *Chevron* deference to the RTC's interpretation of 12 U.S.C. § 1821 (e) where several agencies administer the statute); *Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) ("[W]here . . . Congress has entrusted more than one

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4. *See* the excerpt from FIRREA's legislative history quoted at p. 6, *supra*. If OTS was right that "unjust enrichment" was present any time a debt allegedly owed was unpaid, then every contract dispute over the payment of money would be a candidate for administrative adjudication, directly contrary to Congress' intent that the administrative remedy be reserved for the more serious cases.

federal agency with the administration of a statute . . . a reviewing court does not . . . owe as much deference as it might otherwise give if the interpretation were made by a single agency similarly entrusted with powers of interpretation").

Judge Rogers declined to join the panel majority on the issue of deference, but she was quick to point out in her concurring opinion[5] that the issue was not one which was critical to the court's essential holding or to the outcome of the case:

> The court has yet to decide the appropriate standard to review the OTS' construction of this provision of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") pertaining to cease and desist orders, and the court need not do so here. As in *Wachtel*, the result is the same whether the court applied *de novo* review or *Chevron* deference. The statutory language and the legislative history demonstrate that Congress did not intend that retention of money allegedly owed pursuant to a net worth maintenance agreement, by itself, would constitute "unjust enrichment" under § 1818(b)(6)(A)(i).

Rapaport, Pet. App. at 20a (footnote omitted).

There is no merit to the Government's contention that the D.C. Circuit's discussion of *Chevron* deference conflicts with

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5. The fact that Judge Rogers described her opinion as one "concurring in part and concurring in the judgment" is significant. Had she believed Judge Ginsburg's discussion of *Chevron* deference to be dispositive of the case, or otherwise central to the Court's judgment in favor of Rapaport, she would more properly have labeled her opinion, in whole or in part, as a "dissent."

decisions in other circuits. The outcome of the cases cited on this point in the Petition turned primarily on the language of the statute and congressional intent in enacting the legislation. None of the cases cited as conflicting with *Rapaport* ever mentioned or discussed the level of deference owed to an agency which shares responsibility for administering a statute with several other agencies.

In *In re Seidman*, 37 F.3d 911 (3d Cir. 1994), for example, a case the Government says conflicts with *Rapaport*, the Third Circuit described the standard of review in these words:

> In deciding legal issues, we must defer to an agency's consistent interpretation of the statute it administers unless it is "arbitrary and capricious," *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). Nevertheless, when "bizarre" interpretations of a statute are made out of regulatory zeal," deference is not appropriate. *See Wachtel v. OTS*, 982 F.2d 581, 585 (D.C. Cir. 1993). Similarly, interpretations contrary to the plain meaning of the statute are unacceptable. *Elliott Coal Mining Co., Inc. v. Director, OWCP*, 17 F.3d 616, 629 (3d Cir. 1994).

Id. at 924. *Seidman* never addressed the issue of administration of a statute by more than one agency, and its articulation of the standard for according *Chevron* deference is precisely the standard applied in *Rapaport*. *See also Oberstar v. FDIC*, 987 F.2d 494, 501 (8th Cir. 1993) ("Though we must uphold any reasonable FDIC interpretation of the Control Act . . . we conclude that it does unacceptable violence to the plain language

of the statute for the agency to create narrow classes of 'exempt transactions' and then hold that all other transactions are automatically covered").

Nor does *Akin* conflict with *Rapaport* on this issue. The only discussion of *Chevron* deference in *Akin* appeared in the discussion of Akin's claim that OTS' cease-and-desist authority extended only to operating institutions and therefore ended when an institution was placed in receivership. On this issue, the Fifth Circuit held:

> *In the absence of clear congressional intent* to impose an automatic stay of cease and desist proceedings upon [the institution of] receivership, the Court should look only to "whether the agency's [action] is based on a permissible construction of the statute." [*citing Chevron*].

950 F.2d at 1185 (emphasis added). Although the agency ultimately prevailed in *Akin*, there is nothing in the Fifth Circuit's brief reference to *Chevron* that conflicts with the D.C. Circuit's position in *Rapaport*. The D.C. Circuit relied upon "clear congressional intent" to reject OTS' interpretation of the statute in both *Rapaport* and *Wachtel*.[6]

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6. *See Rapaport*, Pet. App. at 16a (expressing concern that OTS' interpretation of § 1818(b)(6)(A) would "eviscerate congressional intent"); *Wachtel*, 982 F.2d at 586 (attributing OTS' attempts to "circumvent the statutory language" to "excessive zeal").

Both of the other cases cited by the government as being in conflict with *Rapaport*, *Simpson v. OTS*, 29 F.3d 1418 (9th Cir. 1994), *cert. denied*, 130 L. Ed. 2d 1064 (1995) and *Rapp v. OTS*, 52 F.3d 1510 (10th Cir. 1995), referenced the silent and ambiguous nature of the statute in support of their

(Cont'd)

The D.C. Circuit majority's decision not to defer to OTS' "interpretation" of the meaning of "unjust enrichment" was therefore perfectly justified and fully in accord with the principles of *Chevron*. Were there any question about this, however, such a question would provide no basis for review in this Court. As the concurring panel member was quick to point out, the issue of *Chevron* deference was not an essential part of the case and its resolution one way or the other would not have changed the outcome.

IV.

THE GOVERNMENT SEEKS CERTIORARI ON A GROUND NEVER PRESSED OR PASSED UPON BY THE COURT BELOW.

Recognizing, as it must, that the D.C. Circuit correctly interpreted the statutorily defined (and limited) conditions under which OTS can seek payment of money from a respondent in an administrative proceeding, the Government presents an entirely new theory to this Court, one which it never asserted in the underlying administrative proceeding and never raised on appeal in the D.C. Circuit. The Government now claims OTS could have ordered Respondent to pay money solely on the basis of the agency's "cease-and-desist" authority, 12 U.S.C. § 1818(b)(1), without resort to the agency's authority in 12 U.S.C. §§ 1818(b)(1) and (b)(6) to order "affirmative action to correct or

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(Cont'd)
decision to defer to OTS' interpretation of the phrases "reckless disregard" and "pattern of misconduct." Clearly, the court in *Rapaport* did not find the statute similarly silent or ambiguous, and these cases can be distinguished on this ground alone. In addition, it is interesting to note that the Court of Appeals in *Rapp* noted that Congress ". . . has entrusted the OTS with the responsibility for administering the statute." *Id.* at 1518. This court may not have even been aware that FIRREA is administered by more than one agency.

remedy" a condition resulting from the supposed violation. Even if this argument had merit — which it does not — the traditional rule of this Court precludes a grant of certiorari when the question presented was "not pressed or passed upon below." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *United States v. Williams*, 504 U.S. 36, 40 (1992). This new theory was not pressed or passed upon below. Indeed, Respondent believes it has never been pressed or passed upon in any case.

In its new theory, described at pp. 15-17 of its Petition, the Government says that 12 U.S.C § 1818(b)(1) grants two powers to OTS. They are the power to order an institution-affiliated party to "cease and desist" from engaging in violative conduct, and the power to order an institution-affiliated party to take "affirmative action" to correct conditions resulting from the claimed violation.[7] The Government then proceeds to contend, for the first time, that this case does not involve OTS' use of its "affirmative action" power. Therefore, the Government says, the case does not call into play the standards for affirmative action contained in § 1818(b)(6), most particularly the limitations of § 1818(b)(6)(A) requiring proof of unjust enrichment or reckless disregard for law for an order requiring the payment of money. The Government now contends, for the first time, that OTS' order to Rapaport to pay money can be upheld *solely* on the basis of the "cease-and-desist" authority of § 1818(b)(1), without any resort to the agency's authority to order "affirmative action." To reach this conclusion, the Government engages in some linguistic sleight of hand.

The Government now asserts that, if OTS believes Respondent breached a net worth maintenance agreement, it can obtain the relief it seeks (payment of money) in either of two

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7. 12 U.S.C. § 1818(b)(6) then goes on to describe and limit the types of affirmative action that can be ordered. *Wachtel*, 982 F.2d at 585.

ways. It can invoke its authority under §§ 1818(b)(1) and 1818(b)(6)(A), to direct Respondent to take "affirmative action." It does this by issuing an order that says, in effect, "I order you to pay $1.5 million." Since this is an order directing affirmative action — the payment of money — OTS must show unjust enrichment (or reckless disregard for law). Alternatively, so the new theory goes, OTS can rely solely on its cease-and-desist authority under § 1818(b)(1). If it elects to do that, it issues an order that says, in effect, "I order you to stop failing to pay $1.5 million." Though the result is the same — the payment of money — the Government says this alternative does not involve use of § 1818(b)(6)(A), so OTS has no need to prove unjust enrichment.

As is obvious, the Government's second alternative is simply a play on words, a classic example of the exaltation of form over substance. Since by definition a double negative ("stop failing to pay") equals a positive ("pay"), the Government thinks it has come up with a clever "end run" around the requirements and limitations of § 1818(b)(6). However the Government's new "double negative" theory is not only illogical, but it does violence to the clear language of the statute,[8] and to the fundamental rule of

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8. This tortured interpretation of 12 U.S.C. § 1818(b) is a litigation strategy for this case. It is not the construction of Section 1818(b) that OTS uses in the real world. For example, as recently as November 8, 1995, the very day the Government's Petition was filed in this Court, the Acting Director of OTS described in another case the interplay of the agency's "cease-and-desist" and "affirmative action" authority:

> The authority to issue a cease and desist order includes the authority to *place limitations on the activities or functions* of an insured depository institution or an institution-affiliated party .... Additionally, *if statutory predicates are satisfied*, the agency may require a party to *take affirmative actions* to correct or

(Cont'd)

statutory construction that states that a Court should avoid interpretations which render other portions of a statute meaningless.[9]

Quite apart from (or perhaps because of) the facial absurdity of its "double negative" argument, OTS has never raised the argument during any aspect of the underlying administrative or appellate proceedings in this case,[10] and has never sought to predicate Mr. Rapaport's liability on this strained reading of

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(Cont'd)

> remedy any conditions resulting from any violation or practice with respect to which such order is issued. 12 U.S.C. § 1818(b)(1) and (6).

In re Seidman, OTS Order No. AP95-35 (Nov. 8, 1995) (emphasis added). The Acting Director said nothing about a "double negative" alternative that would allow the agency to avoid the requirements for ordering affirmative action.

9. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." Sutherland Stat. Constr. § 46.06 (5th Ed. 1992).

10. The Government tries to give the impression in its Statement of the Case that the Acting Director relied solely on § 1818(b)(1) and that the D.C. Circuit overruled him on this issue. Petition at 6. In fact, though the Acting Director cited to § 1818(b)(1) as his authority to issue a cease-and-desist order, he then went on to discuss his authority to take action to remedy any condition caused by a violation. *On the issue of remedy*, he cited to § 1818(b)(1) *and* (6) (specifically recognizing the preconditions of § 1818(b)(6)(A)), with a *"see also"* citation to *Wachtel* and *Akin*. Pet. App. at 53a. Both the Acting Director and the D.C. Circuit correctly framed the issue in this case as one of OTS compliance with the requirement that it prove unjust enrichment before it could order the payment of money. Only in the Petition does the Government claim, for the first time, that the issue is anything else.

§ 1818(b)(1).[11] As noted above, this Court will not grant certiorari when the question presented was not pressed or passed upon below. Also, this Court has made it clear on numerous occasions that "courts may not accept appellate counsel's post hoc rationalizations for agency action." *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

OTS' Enforcement Review Committee never relied upon the "double negative" argument or any "independent" cease-and-desist authority to issue the Notice of Charges in this case. Rather, the agency alleged:

> By violating the Agreement and/or condition imposed in writing *Rapaport has been unjustly enriched as that phrase is used in Section 8(b)(6) of the FDIA* as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)(6)).

Notice of Charges, ERC Resolution No. 90-49 at 6, ¶ 26 (July 2, 1990), Resp. App. at 6a (emphasis added). Nor did the Administrative Law Judge rely on this theory in issuing his Recommended Decision:

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11. OTS also never raised the "double negative" argument in the *Wachtel* or *Akin* cases, the only other circuit court cases involving administrative enforcement of net worth maintenance obligations, or in any other case of which Respondent is aware. In fact, in another administrative net worth maintenance case which OTS has been litigating for well over a year, and which is now before the Administrative Law Judge on cross-motions for summary disposition, OTS has just moved to amend its Notice of Charges and its motion for summary disposition to assert the new "double negative" argument. These papers, which are reproduced in Respondent's Appendix ("Resp. App.") at 8a and 14a, make it abundantly clear that OTS regards this as a brand new theory.

> OTS is not suing in Court on the contract but has commenced this administrative proceeding under the terms of the thrift statute. Clearly Mr. Rapaport does have capital which under the NWMA he was requested to infuse into Great Life but did not and thus he should not retain it but should deliver it to OTS *since he has thereby been unjustly enriched.*

Recommended Decision and Order at 52 (emphasis added). *See also Id.* at 55 (finding that Mr. Rapaport "was unjustly enriched as that phrase is used in section 8(b)(6) of the FDIA as amended by the FIRREA, 12 U.S.C. § 1818(b)(6)").

The OTS Acting Director too found "that Respondent has been unjustly enriched by his violation of the Net Worth Maintenance Agreement" (*citing Akin*). Acting Director's Decision, Pet. App. at 65a. In his conclusions of law, the Acting Director relied on § 1818(b)(6), not on any "free-floating" cease-and-desist authority under § 1818(b)(1), to support his finding that payment of money by Mr. Rapaport would be the appropriate remedy:

> Among other things, section 8(b)(6) of the FDIA [Section 1818(b)(6)] permits the OTS to issue a cease and desist order requiring an institution-affiliated party such as Respondent to correct or remedy his violation of a written agreement, including a requirement that he "make restitution or provide reimbursement, indemnification, or guarantee against loss" if he has been unjustly enriched by his violation . . .

Acting Director's Decision, Pet. App. at 78a.

Nor did OTS try to raise this new argument before the D.C. Circuit. There, instead, it relied on its reading of *Akin* and its "interpretation" of the language of § 1818(b)(6)(A)(i), arguing that "unjust enrichment" occurs whenever money is owed but not paid. OTS never tried to characterize or justify the agency's order that Respondent pay $1.5 million as an exercise of its "cease-and-desist" power disembodied from an exercise of its "affirmative action" power. It never tried to justify affirmative action by the linguistic trick of a double negative.

The Government tries to excuse the failure to raise this argument below on the D.C. Circuit's decision in *Wachtel*, saying that case had already resolved the issue against it, so it would have been futile to raise the issue before the same court in *Rapaport*. Petition at 17. Had the D.C. Circuit actually been presented with the new "double negative" theory in *Wachtel*, it might have added it to the list of OTS arguments it found in that case to be "barely intelligible" or "frivolous." *Wachtel*, 982 F.2d at 585. As it happened, however, the argument was never made. Instead, OTS argued that since § 1818(b)(1) authorized *affirmative action*, the agency could order affirmative action on authority of § 1818(b)(1) alone and did not have to meet the requirements for affirmative action set forth in § 1818(b)(6). The D.C. Circuit said in rejecting this argument:

> . . . the government contends, in accordance with OTS' order, that the term "affirmative action" in § 1818(b)(1) is not limited at all by what might be thought to be a definition of affirmative action in § 1818(b)(6). We should think of the term used in § 1818(b)(1), instead, as more free floating, not necessarily bound to Congress' elaboration of the phrase in § 1818(b)(6); as far as we can tell, for that matter, not particularly bound to any linguistic restraint in the statute.

* * *

> It seems to us almost frivolous to claim that the agency's authority to require affirmative action in § 1818(b)(1) is not limited by the later section, § 1818(b)(6), in which Congress sets forth what it means by "affirmative action."

Wachtel, 982 F.2d at 585.[12] What the D.C. Circuit rejected (as "almost frivolous") in *Wachtel*, therefore, was the argument that § 1818(b)(1)'s *affirmative action authority* could somehow be divorced from the requirements for affirmative action set forth in § 1818(b)(6).[13] Having lost that argument, the Government now

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12. *See also* Brief of Respondent Office of Thrift Supervision in *Wachtel* at 47 ("12 U.S.C. §1818(b)(1) . . . authorizes the director to order a respondent to take *affirmative action* to correct conditions resulting from any violation of a condition imposed in writing. Acting pursuant to this provision, which does not require any finding of unjust enrichment or reckless disregard for the law, the Director ordered that Petitioners correct the capital deficiency") (emphasis added); *and see* Oral Argument of Dirk Roberts, Counsel for the Office of Thrift Supervision, on November 3, 1992 before the D.C. Circuit at 30 ("You get around [the requirements of unjust enrichment and reckless disregard] because (b)(1), the general provision in (b)(1), which (b)(6) amplifies and does not restrict, does not require those findings; (b)(1) authorizes the Director to order affirmative action to correct conditions resulting from a violation.").

13. The Government cites *United States v. Williams*, and cases which precede it, as authority for its position that this Court should review its "double negative" theory as articulated in *Wachtel*, even though the issue was not raised in *Rapaport*. The Government's reliance on *Williams*, however, is misplaced. In that case, this Court held that:

> It is a permissible exercise of our discretion to undertake review of an important issue *expressly decided* by a federal court where, although the

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advances the proposition that § 1818(b)(1)'s *cease-and-desist authority* can be similarly divorced and can provide stand-alone justification for what is clearly "affirmative action." The new argument has no more merit than the old, but it is a decidedly different argument.

Even if the Government's new theory had merit — which it does not — in light of the fact that this issue was never pressed, nor passed upon by the Court below, the question of justification of the order in this case solely on § 1818(b)(1)'s basic "cease-and-desist" authority is not properly presented in the Petition and does not provide any basis for grant of a writ of certiorari.

(Cont'd)

> petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede the correctness of that precedent.

504 U.S. at 44-45 (footnote omitted; emphasis added). Whether or not OTS conceded the correctness of *Wachtel* (having sought neither reargument nor certiorari in the case), OTS' new theory was not even presented to, much less *expressly decided* by the D.C. Circuit in *Rapaport* or *Wachtel*.

CONCLUSION

The language of 12 U.S.C. §§ 1818(b)(1) and 1818(b)(6) expresses the clear intent of Congress, an intent recognized by the courts in *Akin*, *Wachtel* and *Rapaport*, that OTS can recover money in an administrative proceeding only when it can prove unjust enrichment or reckless disregard for law. OTS cannot show unjust enrichment in this case, because Respondent reaped no personal benefit. If OTS has a remedy against Respondent, that remedy lies in an Article III court, not in an administrative forum. To hold otherwise would be to give OTS an unfettered power to engage in administrative enforcement, and that is a power Congress never intended it to have. There is no basis on which to conclude the D.C. Circuit's decision is incorrect, and there is no reason for this Court to review that decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A — THE OFFICE OF THRIFT SUPERVISION'S NOTICE OF CHARGES ISSUED AGAINST MR. RAPAPORT ON JULY 2, 1990

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

Enforcement Review
Committee Resolution
No. 90-49
dated July 2, 1990

In the Matter of

ROBERT D. RAPAPORT

Majority Shareholder of Great Life Savings Association, Sunrise, Florida

NOTICE OF CHARGES AND HEARING

In accordance with Section 5(d)(1)(A) of the Home Owners' Loan Act of 1933 ("HOLA"), as amended by Title III of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA") (to be codified at 12 U.S.C. § 1464(d)(1)(A)), and Section 8(b) of the Federal Deposit Insurance Act ("FDIA"), as amended by Title IX of the FIRREA (to be codified at 12 U.S.C. § 1818(b)), the Office of Thrift Supervision ("OTS"), being of the opinion that Robert D. Rapaport has violated the net worth maintenance agreement between him and the Federal Savings and Loan Insurance Corporation ("FSLIC") by failing to maintain the net worth of Great Life Savings Association, Sunrise, Florida ("Great

Life"), as required by such agreement, hereby issues this Notice of Charges and Hearing ("Notice of Charges") against Robert D. Rapaport.

I. JURISDICTION

1. Robert D. Rapaport ("Rapaport) own approximately 233,111 shares of Great Life's total outstanding shares of stock or approximately 70 percent of Great Life's outstanding shares. Rapaport resides in Palm Beach County, Florida.

2. Great Life is a state-chartered stock institution, which is located in Sunrise, Florida. In March 1985, Great Life was chartered and received its insurance of accounts from the FSLIC. Great Life does not currently operate any branch offices.

3. Great Life is a "savings association" as defined by Section 2(4) of the HOLA, as amended by Section 301 of the FIRREA (to be codified at 12 U.S.C. § 1462(4))5 Section 3(b) of the FDIA as amended by Section 204(b) of the FIRREA (to be codified at 12 U.S.C. § 1813(b)); and Section 4 of the FDIA, as amended by Section 205 of the FIRREA (to be codified at 12 U.S.C. § 1814).

4. The Director of the OTS is the "appropriate Federal banking agency" as defined in Section 3(q) of the FDIA, as amended by Section 204 of the FIRREA (to be codified at 12 U.S.C. § 1813(q)).

5. The Director of the OTS has the authority to bring this administrative cease and desist proceeding pursuant to Section 5(d)(1)(A) of the HOLA, as amended by Title III of the

FIRREA (to be codified at 12 U.S.C. § 1464(d)(1)(A)), and Section 8(b) of the FDIA, as amended by Title IX of the FIRREA (to be codified at 12 U.S.C. § 1818(b)).

6. Rapaport acquired control of Great Life in 1985. Rapaport was a controlling shareholder of Great Life during all relevant times herein. Therefore, he is an "institution-affiliated party" as defined in Section 3(u) of the FDIA, as amended by Section 204(f)(6) of the FIRREA (to be codified at 12 U.S.C. § 1813(u)).

7. The OTS may enforce written agreements entered into with the FSLIC or the Federal Home Loan Bank Board ("FHLBB"), or conditions imposed in writing by the FSLIC or FHLBB, pursuant to Section 3(e) of the HOLA, as amended by Title III of the FIRREA (to be codified at 12 U.S.C. § 1462a(e)), and Sections 401(f), 401(g), and 401(h) of the FIRREA.

8. Rapaport is subject to the authority of OTS to bring this administrative cease and desist proceeding against him pursuant to section 8(b) of the FDIA, as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)).

II. FACTS

9. On March 19, 1985, Rapaport entered into a Net Worth Maintenance Agreement ("Agreement") with the FSLIC, pursuant to a condition imposed in writing by the FHLBB as operating head of the FSLIC in connection with its approval of Rapaport's acquisition of approximately 70 percent of Great Life's outstanding stock and a de novo application for insurance of accounts. The Agreement is attached hereto as Exhibit 1 and made a part of this Notice of Charges.

Appendix A

10. FHLBB Resolution No. 85-156 ("Resolution") approved Rapaport's acquisition of control and the application for insurance of accounts subject to the condition, among other things, that Rapaport agree to maintain the net worth of Great Life at certain levels. The Resolution is attached hereto as Exhibit 2 and made a part of this Notice of Charges.

11. Under the conditions of approval in the Resolution and the terms of the Agreement, Rapaport agreed to maintain his pro-rata share of Great Life's minimum net worth as required by 12 C.F.R. § 563.13 and any successor regulation thereto and to infuse sufficient additional capital to effect compliance with his pro-rata share of such requirement.

12. Section VIII(D) of the Agreement provided that with respect to successor regulations, subsequent amendments of regulations then in effect "may increase or decrease" Rapaport's obligations under the Agreement.

13. The terms of the Agreement defined a "default" under Section II as the failure of Rapaport to maintain Great Life's net worth in compliance with the Net Worth Requirement under 12 C.F.R. § 563.13 or any successor regulation.

14. Section V(A)(1) of the Agreement provided that in the case of a default, Rapaport shall infuse additional capital in a form satisfactory to the Supervisory Agent in an amount equal to the amount of any net worth deficiency multiplied by the percentage of his stock ownership of Great Life.

15. Great Life failed to meet its regulatory capital requirement as of September 30, 1989 by at least $152,000.

16. On November 14, 1989, the OTS Atlanta District provided written notice to Rapaport of Great Life's failure to meet it capital requirement as of September 30, 1989, and requested that he infuse additional capital in the amount of $106,248 into Great Life in accordance with the terms of the Agreement.

17. By letter dated November 30, 1989, Rapaport stated that he was unable to infuse additional capital into Great Life according to the terms of the Agreement.

18. A notice of failure to correct the net worth deficiency of Great Life within 60 days pursuant to Section V of the Agreement was given by the OTS Atlanta District to Rapaport by letter dated January 16, 1990.

19. Great Life failed to meet its regulatory capital requirement by approximately $980,000 as of December 1, 1989.

20. Under the new capital standards of the FIRREA, Section 5(t) of the HOLA, as amended by Title III of the FIRREA (to be codified at 12 U.S.C. § 1464(t)), and regulations promulgated thereunder, 12 C.F.R. pt. 567 (1990), which succeeds 12 C.F.R. § 563.13, the net worth deficiency of Great Life as of December 31, 1989, was approximately $1.7 million for tangible capital, $2.4 million for core capital and $3.2 million for risk-based capital.

21. From approximately September 30, 1989, through the date of the issuance of this Notice of Charges, Rapaport has failed to maintain the net worth of Great Life in accordance with the Agreement.

Appendix A

III. CHARGES

22. Paragraphs 1 through 22 are realleged and incorporated herein by reference.

23. The Agreement is a "written agreement entered into with the agency," as that phrase is used in Section 8(b)(1) of the FDIA, as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)(1)), and a "written agreement entered into with the Corporation," as that phrase was used in Section 409(e) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1730(e)(1982).

24. The condition contained in the Resolution that Rapaport agree to maintain his pro-rata share of Great Life's minimum net worth is a "condition imposed in writing" as that phrase is used in Section 8(b)(1) of the FDIA, as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)(1)), and was used in Section 407(e) of the NHA, 12 U.S.C. § 1730(e) (1982).

25. Rapaport violated the Agreement and the condition imposed in writing as of approximately September 30, 1989, and has continued to violate such Agreement and condition imposed in writing as of the date of this Notice of Charges by failing to cause the net worth of Great Life to be maintained at a level required by such Agreement and/or 12 C.F.R. § 563.13 or successor regulation, and by failing to infuse sufficient additional capital as required by such Agreement.

26. By violating the Agreement and/or condition imposed in writing Rapaport has been unjustly enriched as that phrase is used in Section 8(b)(6) of the FDIA as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)(6)).

Appendix A

IV. NOTICE OF HEARING

Notice is hereby given that an administrative hearing will be held pursuant to Section 8(b) of the FDIA, as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)), and in accordance with the Rules of Practice and Procedure of the Office of Thrift Supervision, 12 C.F.R. pt. 509 (1990) ("Procedural Rules"), to determine whether an Order to Cease and Desist should issue against Robert D. Rapaport for violation of the Agreement and condition imposed in writing. The hearing is hereby fixed for sixty days after service of this Notice of Charges in Ft. Lauderdale, Florida before a presiding officer to be designated by the Office of Thrift Supervision, subject to change by order of the presiding officer or the OTS.

Rapaport is directed to file an Answer to the allegations contained herein within twenty (20) days from the date of service hereof, as provided by Section 509.14 of the Procedural Rules. The requirements of the Answer, as well as the consequences of failure to file an Answer, are set forth in Section 509.14 of the Procedural Rules. Rapaport is also directed to have his respective representative, if any, file a Notice of Appearance as set forth in Section 509.5 of the Procedural Rules.

By the Enforcement Review
Committee

s/ Rosemary Stewart
Rosemary Stewart
Secretary, Enforcement
Review Committee
Director of Enforcement

APPENDIX B — THE OFFICE OF THRIFT SUPERVISION'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DISPOSITION *IN RE CITYFED FINANCIAL CORP., ET AL.*

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

Re: OTS Order No. AP 94-26

Dated: June 2, 1994

In the matter of

CITYFED FINANCIAL CORPORATION, Nantucket, Massachusetts,

a Savings and Loan Holding Company, and

GORDON E. ALLEN
JOHN W. ATHERTON, JR.
EDWIN M. HALKYARD
ALFRED J. HEDDEN
PETER R. KELLOGG
WILLIAM A. LIFFERS and
GILBERT G. ROESSNER

Former Directors of CITY FEDERAL SAVINGS BANK Bedminster, New Jersey.

Appendix B

SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OTS'S MOTION FOR PARTIAL SUMMARY DISPOSITION

Enforcement hereby supplements its pending Motion for Partial Summary Disposition of its cease and desist claim against respondent CityFed Financial Corp. ("CityFed"). Enforcement initially moved for partial summary disposition in August, 1994 and supplemented that motion in September and October, 1995.

BACKGROUND

The second round of summary disposition motions in this case was the result of the July, 1995 ruling of the United States Court of Appeals for the District of Columbia in *Rapaport v. OTS*, 59 F.3d 212 (D.C. Cir. 1995). On November 8, 1995, the Solicitor General, on behalf of OTS, filed a Petition for a Writ of Certiorari with the United States Supreme Court in *Rapaport. See* 64 U.S.L.W. 3359 (U.S. Nov. 14, 1995) (No. 95-738).

In that petition, the Solicitor General argues, *inter alia*, that the Director's order at issue in the *Rapaport* case was within OTS's authority to order a party to cease and desist from violating a written net worth maintenance agreement under 12 U.S.C.A. § 1818(b)(1). *See* Petition for Writ of Certiorari, *Rapaport v. OTS*, at 15-17. Although the original Notice of Charges in this case invoked OTS's cease and desist authority under § 1818(b), OTS has amended its pleadings to more explicitly highlight the § 1818(b)(1) grounds for relief. In order to present that argument to the Administrative Law

Judge as part of his consideration of OTS's entitlement to summary disposition,[1] Enforcement hereby supplements its Memorandum in Support of Motion for Partial Disposition to articulate OTS's basic authority under § 1818(b)(1).

ARGUMENT

1. OTS is Entitled to a Cease and Desist Order Requiring CityFed to Honor its Net Worth Maintenance Agreement Under 12 U.S.C.A. § 1818(b)(1).

Section 1818(b)(1) provides OTS with the general authority to issue orders requiring that institution-affiliated parties, including savings and loan holding companies (see 12 U.S.C.A. § 1818(b)(9)), cease and desist from engaging in an unsafe or unsound practice, violating a condition imposed in writing by the agency in connection with the granting of any application, or violating any written agreement with the agency. Here, CityFed entered into a written agreement with the FHLBB, as a condition of the FHLBB's granting of CityFed's application to acquire and receive stock dividends from City Federal, and then violated that agreement.

Under § 1818(b)(1), the Director has the authority to order CityFed to cease and desist from that violation. Because the agreement in question was one to pay money under certain

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1. In a November 27, 1995 letter to the Administrative Law Judge, Mr. Eisenhart tates that he will oppose the § 1818(b)(1) argument raised by the Solicitor General in the *Rapaport cert.* petition in part because that argument had not been raised by OTS earlier in that case. Supplementation of the Notice of Charges and summary disposition papers in this case will allow the § 1818(b)(1) claim to be presented at the earliest possible stage in the administrative proceedings, prior to any rulings on dispositive motions.

circumstances, which have transpired, the cease and desist order requiring performance of that agreement would effectively require the payment of money. *Cf., Bowen v. Massachusetts*, 487 U.S. 879, 893-901 (1988) (distinguishing specific relief requiring payment of money from "money damages").

The validity of such an order does not depend on OTS's authority to order "affirmative action" under the last sentence of § 1818(b)(1), or under § 1818(b)(6). Those provisions merely supplement OTS's basic authority under § 1818(b)(1) to order CityFed to cease and desist from violating its written net worth maintenance agreement with the agency. Section 1818(b)(1) further provides that any such order may require a party to cease and desist from its violation by provisions which may be mandatory or otherwise." That basic authority, which flows directly and solely from § 1818(b)(1), is sufficient authority for issuance of a cease and desist order requiring CityFed to honor the net worth maintenance agreement.

Such an order is not precluded by the decision in *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993). The D.C. Circuit's sweeping declaration in *Wachtel* that an order to comply with a net worth maintenance agreement could only be entered under § 1818(b)(6) was based on a construction of the interrelationship between the affirmative action phrase contained in the last sentence of § 1818(b)(1) and the enumeration of affirmative action remedies in §1818(b)(6). The court in *Wachtel* did not properly consider the authority available to the Director of OTS in the basic cease and desist powers of § 1818(b)(1) to compel compliance with a written net worth maintenance agreement and by mandatory

provisions require the performance of that agreement by ordering the payment of money. Clarifying and preserving that argument at this stage of this proceeding squarely presents the issue prior to any decision on the merits.[2]

There is no dispute on the record in this case that CityFed has violated its written net worth maintenance agreement with the FHLBB. In fact, it has admitted as much in its Answer. *See* CityFed's Amended Answer at ¶¶ 23, 25. That is the only material issue involved in a determination whether an order under § 1818(b)(1) to cease and desist is appropriate. Accordingly, OTS is entitled as a matter of law to an order requiring CityFed to cease and desist from violating the net worth maintenance agreement and pay what is due under that agreement.

CONCLUSION

Based on the foregoing, there is no dispute that CityFed has violated its net worth maintenance agreement and OTS is entitled as a matter of law to an order requiring CityFed to cease and desist from violating the net worth maintenance agreement and requiring compliance therewith.

Dated: November 30, 1995 Respectfully submitted,

RICHARD C. STEARNS
Deputy Chief Counsel

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2. In any event, if the holding in *Wachtel* is deemed to preclude every order to cease and desist that will ultimately result in the payment of money, OTS has not acquiesced in that ruling.

Appendix B

s/ Richard R. Riese
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APPENDIX C — THE OFFICE OF THRIFT SUPERVISION'S MOTION TO AMEND THE NOTICE OF CHARGES ISSUED IN *IN RE CITYFED FINANCIAL CORP., ET AL.*

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

Re: OTS Order No. AP 94-26

Dated: June 2, 1994

In the matter of

CITYFED FINANCIAL CORPORATION, Nantucket, Massachusetts,

a Savings and Loan Holding Company, and

GORDON E. ALLEN
JOHN W. ATHERTON, JR.
EDWIN M. HALKYARD
ALFRED J. HEDDEN
PETER R. KELLOGG
WILLIAM A. LIFFERS and
GILBERT G. ROESSNER

Former Directors of CITY FEDERAL SAVINGS BANK Bedminster, New Jersey.

Appendix C

MOTION FOR LEAVE TO FILE AMENDED NOTICE OF CHARGES AND TO SUPPLEMENT MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DISPOSITION

Pursuant to Rule 509.20(a) of the Office of ThriftSupervision's ("OTS's") Rules of Practice and Procedure, 12 C.F.R. §§ 509, *et seq.*, Enforcement hereby moves for leave amend the Notice of Charges and Hearing for Cease and Desist Order to Direct Restitution and Other Appropriate Relief and Notice of Assessment of Civil Money Penalties ("Notice of Charges") issued by OTS in this case on June 2, 1994. An Amended Notice of Charges ("Amended Notice") has been issued by the Acting Director, OTS Order No. AP 95-___ (November 30, 1995), and is attached. Enforcement further moves for leave to supplement its Memorandum in Support of Motion for Partial Summary Disposition, originally filed August 1, 1994 and supplemented September 1, 1995. A Second Supplemental Memorandum is also attached.

ARGUMENT

Rule 509.20(a) provides that a Notice of Charges may be amended at any stage of the proceeding by leave of the administrative law judge. That Rule further states that such leave "will be freely given."

The Director, of course, has at all times the authority to issue and amend Notices of Charges. Here, the Acting Director has executed an Amended Notice that substantively changes

only two paragraphs of the original Notice,[1] and thereby clarifies the full breadth of agency remedial authority available for enforcing the net worth maintenance agreement at issue in this case. Those amendments should therefore be treated as an augmentation of the existing proceeding and a supplementation of the present record before the Administrative Law Judge on summary disposition.

CityFed and the individual Respondents will not be prejudiced by the amendments. The amendments do not involve additional factual allegations. Rather, Enforcement seeks leave to amend its file the Amended Notice [sic] and supplement its summary disposition papers simply to clarify and more fully develop a ground for recovery that is also part of OTS's petition for certiorari before the United States Supreme Court in *Rapaport v. OTS*, 59 F.3d 212 (D.C. Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3359 (U.S. Nov. 14, 1995) (No. 95-738).

Specifically, OTS has amended its filings in this case in order to clarify, as stated in paragraph 13 of the Notice of Charges, that the Director is authorized to issue a cease and desist order against CityFed and the individual Respondents pursuant to 12 U.S.C.A. § 1818(b). As such, pursuant to § 1818(b)(1), the Director has the authority to order CityFed and the individual Respondents to cease and desist from engaging in unsafe or unsound practices and/or from violating their written agreement with, and a condition imposed in writing by, the Federal Home Loan Bank Board ("FHLBB"), OTS's predecessor.

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1. The amendments appear at paragraphs 39 and 40 of the Notice of Charges. Enforcement has also updated the names of certain OTS personnel in paragraphs 59-60 and 62.

Appendix C

The amendment makes clear that OTS has not conceded here, any more than it did in *Rapaport*, the limit on its basic cease and desist authority suggested by the D.C. Circuit's earlier opinion in *Wachtel v. OTS*, 982 F.2d 581, 586 (D.C. Cir. 1993).[2] In this case, as in *Rapaport*, an order requiring CityFed and the individual Respondents to cease and desist from violating the written agreement with, and the condition imposed in writing by, their federal regulator would necessarily require payment of CityFed's net worth maintenance agreement. As such, a showing that CityFed has engaged in unsafe or unsound practices or violated its written net worth maintenance obligation is sufficient to meet the standards of § 1818(b)(1) for an order requiring CityFed, "by provisions which may be mandatory or otherwise" (*see* 12 U.S.C.A. § 1818(b)(1)), to cease and desist from its violation and perform its duties.

CityFed has already argued that OTS is not entitled to a cease and desist order under §1818(b)(1), claiming that it has neither violated a condition imposed in writing nor a written agreement with OTS. See CityFed's Amended Answer at 2-3, 7. There is therefore no prejudice to CityFed by the amendments.

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2. In any event, if the holding in *Wachtel* is deemed to preclude every order to cease and desist that wil ultimately result in the payment of money, OTS has not acquiesced in that ruling.

Appendix C

CONCLUSION

Based on the foregoing, this tribunal should grant Enforcement's motion for leave to file an Amended Notice of Charges and to permit Enforcement to supplement its summary disposition papers, such additional filings being herewith submitted, as part of the proceeding initiated by OTS Order No. AP 94-26 (June 2, 1994)

Dated: November 30, 1995

Respectfully submitted

RICHARD C. STEARNS
Deputy Chief Counsel

s/ Richard F. Riese
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